TAN AH THONG

v.

CHE PEE SAAD & ANOR AND OTHER CASES (CONSOLIDATED)

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM FCJ
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-02-629-1997]
14 OCTOBER 2009

CIVIL PROCEDURE: *Appeal - Adducing further evidence - Further evidence adduced to show double recovery - Whether irrelevant to issues raised in appeal - Whether to be raised only before registrar assessing damages awarded by trial judge*

CIVIL PROCEDURE: *Appeal - Adducing further evidence - Three conditions to be satisfied following Ladd v. Marshall and adopted by Federal Court in Lau Foo Sun v. Govt of Malaysia - Relevancy of further evidence to issues raised in proceedings - Whether an additional fourth condition to be satisfied*

CONTRACT: *Damages - Sale and purchase of property - Contract rescinded by non-defaulting party for total failure of consideration - Damages irrecoverable at common law - Whether damages recoverable as action for fraudulent misrepresentation*

The appellant (the first defendant in the trial court) who was the registered proprietor of five lots of land ('the lands') entered into a project with another (the co-defendant in the trial below) to jointly develop the lands by constructing houses thereon for sale to members of the public. The respondent (the plaintiff in the trial court) entered into a sale and purchase agreement ('the agreement') with the appellant for the purchase of a house in the proposed project. The house was to be constructed within 18 months from the date of the agreement. The project eventually was abandoned, by which time the respondent had already paid RM49,000 towards the purchase price of the house. The respondent then filed an action for refund of the monies paid and for damages. Suits were filed by the other purchasers as well which were consolidated with the respondent's action which was tried as a test action. The trial judge

found for the respondent. She also found that the appellant had induced the respondent to enter into the agreement by means of fraudulent misrepresentation. She ordered the refund of the monies paid and damages. The appellant now appealed. At the hearing of the appeal, the appellant applied to adduce further evidence to show that the respondent had already entered judgment against his former solicitor for damages in negligence for not having been careful in protecting the respondent's interests in respect of the transaction of the purchase of the house. It was alleged that the further evidence would enable the appellant to demonstrate that if the order appealed against was not set aside it would lead to double recovery.

Held (dismissing the appeal)
Per Gopal Sri Ram FCJ delivering the judgment of the court:

(1) The issue whether the respondent would recover the same sum twice over and thereby unjustly enrich himself was an issue that was yet to arise. That was because the damages awarded by the trial judge at that instance had yet to be assessed. It was at the assessment stage that the issue now sought to be raised by the appellant would become relevant. (para 2)

(2) The test to adduce further evidence was laid down in *Ladd v. Marshall* and adopted by the Federal Court in *Lau Foo Sun v. Govt of Malaysia* which set the following three conditions: firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; thirdly, the evidence must be such as was presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible. (para 3)

(3) A fourth condition should be added to the three conditions to be satisfied to adduce further evidence, ie, that the further evidence must be relevant to the issues sought to be advanced in the appeal. That was the overriding consideration. If the evidence was wholly irrelevant to the issues in the appeal, it mattered not that the other conditions had been satisfied. At the instant stage of the proceedings, the further evidence was irrelevant. It would become relevant only at the inquiry before

the registrar. It was at that stage that the appellant would have to demonstrate that only nominal damages should be awarded in real terms as the respondent had already been compensated for the identical loss. Also, it was at that stage that the registrar would have to determine whether there was an overlap or whether the causes of action being different, there was none. (paras 3 & 4)

(4) There was ample evidence to show that the appellant and his co-defendant at the trial court had agreed to jointly develop the lands. It was too late in the day for the appellant to now attempt to distant himself from the promise to construct the houses. Any dispute he might have had with his joint venture partner was a matter between them and could have no impact upon his promise to the respondent. He was, on the facts as found by the trial judge, jointly and severally liable with his co-defendant for the damage suffered by the respondent. (para 5)

(5) Whether a party was guilty of a breach of contract or of fraudulent misrepresentation were issues of pure fact. The principles on which the Court of Appeal intervened on appeal in cases that turned on facts were set out in a number of cases. The appellant must show that the trial court misdirected itself on the facts for the appellate court to intervene. In the present case, a reading of the record of appeal showed that the judge did not misdirect herself on the facts. (para 6)

(6) The order of the trial judge directing a rescission of the contract was properly made on the facts of the case. The entire project having been abandoned, there was a failure to perform the promise made to the respondent in its entirety. Consideration had completely failed. The party not in default was entitled at common law to rescind the contract (*Fibrosa SA v. Fairbairn Lawson Combe Barbour Ltd*; foll). (para 7)

(7) When deciding whether there was a total failure of consideration in a given case, the court must first interpret the promise as a whole and then view the performance of the promise from the point of view of the party in default. The test was not whether the innocent party received anything under the contract but whether the party in default failed to perform his promise in its entirety (*Stocznia Gdanska SA v. Latvian Shipping Co*; foll). In the present case, there was no performance at all. It was beyond

dispute that the entire project was abandoned. Accordingly, the respondent was entitled to rescind the contract at common law. (paras 7 & 9)

(8) A party not in default who rescinded a contract at common law for total failure of consideration could not also have damages. However, the trial judge's order was supported by the respondent's alternative cause of action in misrepresentation. Misrepresentation had the effect of vitiating consent, rendering the contract voidable at the option of the innocent party. A voidable contract might be avoided by act of parties or by having it set aside by an order of court. The respondent had sought and was granted an order which in effect set aside the contract. Where a representor acted fraudulently as in the present case, the innocent party, in addition to rescinding the contract might also recover damages for fraud in the tort of *deceit*. It followed, therefore, that there was nothing wrong in the terms of the relief that the trial judge granted. (paras 9 & 10)

[Appellant ordered to pay costs of motion to adduce further evidence and those occasioned by appeal. Orders of High Court affirmed. Deposit to be paid out to respondent for his taxed costs.]

Bahasa Malaysia *Translation Of Headnotes*

Perayu (defendan pertama di mahkamah bicara), pemilik berdaftar kepada lima bidang tanah ('tanah tersebut'), telah memulakan satu projek dengan seorang lain (rakan defendan di mahkamah bicara) bagi membangunkan tanah tersebut secara bersama, iaitu dengan membina rumah-rumah di situ untuk dijual kepada orang ramai. Responden (plaintif di mahkamah bicara) telah memeterai perjanjian jual beli ('perjanjian') bagi membeli sebuah rumah di projek. Rumah dijadual dibina dalam masa 18 bulan dari tarikh perjanjian. Projek akhirnya telah terbengkalai di mana pada waktu itu responden telah pun membayar sebanyak RM49,000 untuk pembelian rumah. Berikutnya responden memfail tindakan bagi mendapat kembali jumlah yang dibayar serta gantirugi. Pembeli-pembeli lain juga telah memfailkan saman, di mana kes-kes mereka telah digabungkan dengan kes responden yang menjadi kes ujian. Hakim bicara mendapati untuk responden. Beliau juga mendapati bahawa perayu telah mendorong responden untuk memeterai perjanjian melalui cara-cara penipuan. Hakim dengan itu memerintahkan pengembalian

wang yang telah dibayar serta gantirugi. Perayu kini merayu. Di pendengaran rayuan, perayu memohon untuk mengemukakan keterangan tambahan bagi menunjukkan bahawa responden sudah pun memeterai penghakiman terhadap peguamcaranya yang terdahulu untuk gantirugi kerana kecuaian, iaitu kerana tidak berhati-hati dalam melindungi kepentingan responden dalam transaksi pembelian rumah. Ianya didakwa bahawa keterangan tambahan akan membolehkan perayu membuktikan bahawa jika perintah yang dirayui tidak diketepikan, maka ia akan membawa kepada pengembalian berganda.

Diputuskan (menolak reayuan)

Oleh Gopal Sri Ram HMP menyampaikan penghakiman mahkamah:

(1) Isu sama ada responden akan mendapat jumlah yang sama dua kali dan dengan itu akan mengkayakan dirinya secara tidak wajar adalah isu yang masih belum berbangkit. Ini kerana gantirugi yang diawardkan oleh hakim bicara pada waktu itu masih perlu ditaksirkan. Hanyalah di peringkat pentaksiran tersebut isu yang hendak dibangkitkan di sini menjadi relevan.

(2) Ujian bagi pengemukaan keterangan tambahan telah dihuraikan di dalam *Ladd v. Marshall* dan diterimapakai oleh Mahkamah Persekutuan di dalam *Lau Foo Sun v. Govt of Malaysia* di mana tiga syarat berikut telah diperturunkan: pertama, ianya hendaklah ditunjukkan bahawa keterangan tidak dapat diperolehi melalui usaha yang munasabah untuk digunakan di perbicaraan; kedua, keterangan hendaklah sebegitu rupa sehinggakan, jika diberi, ia berkemungkinan akan mempengaruhi dengan secara penting keputusan kes, walaupun tidaklah sampai memutuskan halperkara; ketiga, keterangan hendaklah sebegitu rupa sehingga boleh dipercayai, atau, dengan kata lain, ia mestilah kelihatan boleh dipercayai, walaupun tidak sampai tidak boleh dipertikaikan.

(3) Syarat keempat harus juga ditambah kepada tiga syarat-syarat di atas, iaitu, bahawa keterangan tambahan hendaklah relevan kepada isu-isu yang hendak diutarakan di dalam rayuan. Ini malah merupakan pertimbangan yang terpenting. Jika keterangan adalah langsung tidak relevan kepada isu-isu dalam rayuan, maka soal syarat-syarat lain telah dipenuhi tidak membawa apa-apa erti. Di peringkat prosiding seperti dalam kes di sini, keterangan tambahan sudah tidak lagi relevan. Ianya hanya

A relevan semasa penyiasatan di hadapan pendaftar. Itulah peringkatnya di mana perayu perlu menunjukkan bahawa hanya gantirugi nominal, dalam terma-termanya yang sebenar, harus diawardkan memandangkan responden telah pun dipampasi atas kehilangan yang serupa. Itu jugalah peringkatnya di mana B pendaftar akan menentukan sama ada terdapat pergandaan atau sama ada pergandaan tidak wujud disebabkan kausa-kausa tindakan yang berbeza.

(4) Terdapat keterangan yang banyak yang menunjukkan bahawa C perayu dan rakan defendan beliau di perbicaraan telah bersetuju untuk membangunkan tanah tersebut secara bersama. Maka sudah terlambat bagi perayu kini untuk menjauhkan dirinya dari janji untuk membina rumah-rumah berkenaan. Sebarang pertikaian yang beliau mungkin berhadapan dengan rakan D kongsinya adalah soal peribadi mereka dan tidak harus mempunyai apa-apa kesan terhadap janji yang dibuat kepada responden. Berdasarkan dapatan fakta yang dibuat oleh hakim bicara, perayu bertanggungan secara berasingan dan bersesama dengan rakan defendannya atas kerugian yang dialami E responden.

(5) Sama ada sesuatu pihak itu bersalah kerana melanggar kontrak atau melakukan salah nyata fraudulent atau pun tidak adalah merupakan isu fakta semata-mata. Prinsip di atas mana F Mahkamah Rayuan akan campurtangan dalam kes-kes yang melibatkan persoalan fakta sudah pun dihuraikan dalam beberapa kes. Bagi mewajarkan campurtangan sebuah mahkamah rayuan, perayu perlu menunjukkan bahawa mahkamah bicara telah tersalah arah akan dirinya di atas fakta. Meneliti rekod rayuan dalam kes semasa menunjukkan bahawa hakim tidak G tersalah arah akan dirinya di sisi fakta.

(6) Berdasarkan fakta kes, perintah hakim bicara mengarahkan pembatalan kontrak telah dibuat dengan teraturnya. Memandangkan seluruh projek telah terbengkalai, wujud H kegagalan untuk memenuhi segala janji yang dibuat kepada responden. Balasan telah gagal sepenuhnya. Oleh itu, pihak yang tidak bersalah berhak di sisi undang-undang common untuk membatalkan kontrak (*Fibrosa SA v. Fairbairn Lawson Combe Barbour Ltd*; diikuti).

I

(7) Dalam memutuskan sama ada terdapat kegagalan balasan yang sepenuhnya dalam sesuatu kes, mahkamah harus terlebih dahulu mentafsir janji yang dibuat pada keseluruhannya dan kemudian menimbang pelaksanaan janji dari sudut pandangan pihak yang bersalah. Ujiannya bukanlah sama ada pihak yang tidak bersalah telah menerima apa-apa di bawah kontrak, tetapi sama ada pihak yang bersalah gagal menunaikan keseluruhan janjinya (*Stocznia Gdanska SA v. Latvian Shipping Co*; diikuti). Dalam kes semasa, langsung tidak wujud penunaian janji. Adalah tidak dipertikai bahawa keseluruhan projek telah terbengkalai. Oleh itu, responden berhak untuk membatalkan kontrak di sisi undang-undang common.

(8) Pihak tidak bersalah yang membatalkan kontrak di sisi undang-undang common atas alasan kegagalan balasan yang sepenuhnya tidak boleh pada masa yang sama mendapat gantirugi. Walau bagaimanapun, perintah hakim bicara telah disokong oleh kausa tindakan alternatif responden, iaitu salah nyata. Salah nyata mempunyai kesan menghapuskan persetujuan sekaligus menjadikan kontrak boleh dibatalkan oleh pihak yang tidak bersalah. Suatu kontrak yang boleh dibatalkan boleh dielak melalui tingkah laku pihak-pihak atau dengan cara mengenepikannya melalui perintah mahkamah. Responden telah memohon dan diberikan perintah yang secara berkesannya mengenepikan kontrak. Di mana seorang pemberi kenyataan bertindak secara penipuan seperti yang berlaku di sini, pihak yang tidak bersalah, selain dari membatalkan kontrak, boleh juga mendapatkan gantirugi kerana penipuan berdasarkan tort perdayaan. Ianya dengan itu mengikut bahawa tiada apa yang silap mengenai terma-terma relif yang telah dibenarkan oleh hakim bicara.

[Perayu diperintah membayar kos usul untuk mengemukakan keterangan tambahan dan yang terbit dari rayuan. Perintah-perintah Mahkamah Tinggi disahkan. Deposit dibayar kepada responden ke arah kos ditaksir.]

Case(s) referred to:

Car & Universal Finance Co Ltd v. Caldwell [1965] 1 QB 525 ***(refd)***
Derry v. Peek [1889] 14 App Cas 337 ***(refd)***
Fibrosa SA v. Fairbairn Lawson Combe Barbour Ltd [1943 AC 32 ***(foll)***
Ladd v. Marshall [1954] 3 All ER 745 ***(refd)***
Lau Foo Sun v. Goverment of Malaysia [1970] 1 LNS 56 FC ***(refd)***
LSSC Development Sdn Bhd v. Thomas Iruthayam & Anor [2007] 2 CLJ 434 CA ***(refd)***

A *Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC* ***(refd)***
Stocznia Gdanska SA v. Latvian Shipping Co [1998] 1 All ER 883 ***(foll)***

Legislation referred to:
Contracts Act 1950, s. 19(1)

B

For the appellant - K Goik; M/s Nasir Kenzin & Tan
For the respondent - Zainur Zakaria; M/s Zainur Zakaria & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: F314-1985, F555-1984, F412-1983, F24-233-1986]

C

Reported by Usha Thiagarajah

JUDGMENT

D

Gopal Sri Ram FCJ:

[1] The appellant (first defendant in the court below) is the registered proprietor of five lots of land ("the lands"). He entered into an agreement with the second defendant (who is not before us) to jointly develop the lands by constructing houses on them to be offered for sale to members of the public. The respondent (plaintiff in the court below) entered into an agreement to purchase a house in the proposed project. The house was to be constructed within 18 months from the date of the agreement. As it happened the project was abandoned, a fact admitted by the appellant during his testimony in the court below. So, the respondent got nothing although he had paid RM49,000 towards the purchase price of the house. He then filed an action against the appellant claiming the refund of the monies paid and for damages. For completeness I must add that in the court below suits had been filed by four purchasers (including the respondent). These were consolidated and one of them was tried as a test action. The learned trial judge found for the respondent. She also found that the appellant had induced the respondent to enter into the agreement by means of a fraudulent misrepresentation. She ordered the refund of the monies paid and damages.

E

F

G

H

[2] Dissatisfied with the result, the appellant appealed to us. At the hearing of the appeal he applied to adduce further evidence to show that the respondent had already entered judgment against his former solicitor for damages in the tort of negligence for not having

I

been careful in protecting the respondent's interests in respect of this very transaction. This further evidence, it was said, would enable the appellant to demonstrate that if the order appealed against is not set aside it would lead to double recovery. Having considered the arguments of counsel the motion was dismissed. In my judgment, the issue whether the respondent would recover the same sum twice over and thereby unjustly enrich himself is an issue that is yet to arise. This is because the damages awarded by the trial judge in the present instance are yet to be assessed. It is at the assessment stage that the issue now sought to be raised by the appellant will become relevant.

[3] The test to adduce further evidence was laid down in *Ladd v. Marshall* [1954] 3 All ER 745 and adopted by the former Federal Court in *Lau Foo Sun v. Govt of Malaysia* [1970] 1 LNS 56 as follows:

> First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
>
> Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;
>
> Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.

To these three conditions I would add a fourth. The further evidence must be relevant to the issues sought to be advanced in the appeal. This in my view is the overriding consideration. If the evidence is wholly irrelevant to the issues in the appeal, it matters not that the other three conditions have been satisfied.

[4] I found myself in agreement with the submission of Encik Zainur Zakaria of counsel for the respondent that the further evidence is irrelevant at this stage of the proceedings. It will become relevant at the inquiry before the registrar. It is at that stage that the appellant will have to demonstrate that only nominal damages should be awarded in real terms as the respondent has already been compensated for the identical loss. And it is at that stage that the registrar will have to determine whether there is an overlap or whether the causes of action being different, there is none.

[5] With that I now turn to the merits of the appeal proper. In essence, the appellant's case is that the only agreement he had with the respondent was for the sale of land. He had no obligation to ensure that the houses were constructed. If, however, you examine the record, you will find ample evidence to show that the appellant and his co-defendant had agreed to jointly develop the lands. They were akin to partners. See, *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321. That is the way in which they dealt with the respondent. It is too late in the day for the appellant to now attempt to distance himself from the promise to construct the houses. Any dispute he may have with his joint venture partner is a matter between them and can have no impact upon his promise to the respondent. He is, on the facts as found by the trial judge jointly and severally liable with his co-defendant for the damage suffered by the respondent.

[6] Whether a party is guilty of a breach of contract or of fraudulent misrepresentation are issues of pure fact. The principles on which this court intervenes on appeal in cases that turn on facts have been set out in a number of cases. It is not that we have no jurisdiction to interfere in appeals that turn upon a question of fact. But in order for us to do so the appellant must show that the trial court misdirected itself on the facts. A reading of the record of appeal left me with the impression that the judge did not misdirect herself on the facts.

[7] I now turn to the submissions directed at the relief awarded by the trial judge. She directed the appellant to refund the monies paid by the respondent to the former. She also awarded damages. These were to be assessed. The first order directs a rescission of the contract. This was properly made on the facts of this case. The entire project having been abandoned, there was a failure to perform the promise made to the respondent in its entirety. In short, consideration had completely failed. In such a case, the party not in default is entitled at common law to rescind the contract. I find authority in support of this proposition in the speech of Viscount Simon LC in *Fibrosa SA v. Fairbairn Lawson Combe Barbour Ltd* [1943 AC 32, 48 where he said:

> ... in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally

> speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.
>
> If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled ...

What has to be added to the learned Lord Chancellor's view is the qualification:

> ... that failure of consideration does not depend upon the question whether the promisee has or has not received anything under the contract...but rather whether the promisor has performed any part of the contractual duties in respect of which the payment is due. (*Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 All ER 883, per Lord Goff of Chieveley)

In other words, when deciding whether there has in a given case total failure of consideration, the court must first interpret the promise as a whole and next view the performance of the promise from the point of view of the party in default. The test is not whether the innocent party received anything under the contract. The test is whether the party in default has failed to perform his promise in its entirety. The facts of *Stocznia Gdanska* illustrate the proposition.

[8] The plaintiffs were Polish shipbuilders. They entered into several agreements to design, build, complete and deliver ships for the second defendant, a wholly-owned subsidiary of the first defendant. Payment was to be made in instalments. The defendants defaulted and the plaintiffs held them in breach. They sued to recover damages for breach of contract. The defendants argued that that there was a total failure of consideration as they had received no vessel from the plaintiffs. The House of Lords held that the plaintiffs' promise when properly construed was not merely to deliver the ships but to also design them. This latter part of the promise the plaintiffs had performed. There was accordingly no total failure of consideration.

[9] In the present instance there was no performance at all. For, it is beyond dispute that the entire project was abandoned. Accordingly, the respondent was entitled to rescind the contract at common law. There then comes this difficulty. A party not in default who rescinds a contract at common law for total failure of consideration cannot also have damages. See, *LSSC Development Sdn Bhd v. Thomas Iruthayam* [2007] 2 CLJ 434. How then is the learned judge's order to be supported?

[10] The answer, I believe is in the respondent's alternative cause of action in misrepresentation. It is settled that misrepresentation has the effect of vitiating consent, rendering the contract voidable at the option of the innocent party. This is provided by s. 19(1) of the Contracts Act 1950 which states:

> When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

"Voidable" in the present context means that the contract is binding until it is avoided by the innocent representee. A voidable contract may be avoided by act of parties (as happened in *Car & Universal Finance Co Ltd v. Caldwell* [1965] 1 QB 525) or by having it set aside by an order of court. The respondent sought and was granted an order which in effect set aside the contract. And where a representor acts fraudulently as here, the innocent party in addition to rescinding the contract may also recover damages for fraud in the tort of *deceit*. See, *Derry v. Peek* [1889] 14 App Cas 337. It follows that there is nothing wrong in the terms of the relief that the learned judge granted.

[11] For the reasons already given the appeal was dismissed. The appellant was ordered to pay the costs of the motion to adduce further evidence and those occasioned by the appeal. The orders of the High Court were affirmed. The deposit was ordered to be paid out to the respondent to account of his taxed costs.

[12] My learned sisters, Zaleha Zahari and Zainun bt. Ali, JJCA have seen this judgment in draft and have expressed their agreement with it.